

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 22922
and
23071

United States Of America

Appellee.

v.

Austin C. Elridge
Edward Johnson

Appellants

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

STATEMENT OF QUESTION PRESENTED

In view of the lack of a proper identification of appellant, Edward Johnson, did the trial court err in failing to charge the jury to give consideration to lack of evidence in determining whether the members thereof had a reasonable doubt as to his guilt? (TR 464)

In view of the lack of evidence that appellant, Austin C. Eldridge, knowingly and with criminal intent did aid and abet in the crimes charged or with knowledge that an offense had been committed, received, relieved, comforted or assisted the offender with intent to hinder or prevent the latter's apprehension, trial or punishment, did the trial Court err in failing to charge the jury to give consideration to the lack of evidence in determining whether the members thereof had a reasonable doubt as to his guilt? (TR 464)

Did the jury have before it sufficient evidence to convict Appellant, Austin C. Eldridge of the charge of having in his possession a prohibited weapon (sawed-off shot gun) knowingly and willfully, when the testimony disclosed that the weapon was found by the arresting officer in the car driven by Eldridge, at the time of arrest, sitting right behind the driver's side in

the rear...propped up against the seat (TR 264-265) in view of the appellant's testimony that he had never seen the gun in question until after his arrest. (TR 300)

Was Appellant, Edward Johnson, denied due process of law when the Complainant, Floyd White, was permitted to make a tainted in Court identification of him.

The pending case has not previously been before this Court.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 22822

and

23071

AUSTIN C. ELDRIDGE
EDWARD JOHNSON,

Appellants

v.

UNITED STATES OF AMERICA

Appellee

BRIEF FOR APPELLANTS,

AUSTIN C. ELDRIDGE AND EDWARD JOHNSON,
ON APPEAL FROM JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered upon a verdict of guilty of violations of Title 22, District of Columbia Code, Section 3202, Assault with Intent to Commit Robbery while Armed, 501, Assault with Intent to Kill while Armed, 502, Assault with a Dangerous Weapon, and 3214a, Possession of a Prohibited Weapon.

The District Court had jurisdiction under Title 11, District of Columbia Code, Sec. 521. This Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 828, 28 U.S.C., Section 1291.

REFERENCE TO RULINGS

1. Motion For Judgment Of Acquittal Or In The Alternative For a New Trial filed January 17, 1969, by Defendant, Edward Johnson. Denied by Judge Gesell, February 3, 1969.
2. Motion of Defendant, Eldridge, for Judgment of Acquittal Or In The Alternative For A New Trial filed January 23, 1969 denied by Judge Gesell, February 4, 1969.
3. During trial at the close of Government's case (January 10, 1969) counsel for Defendant, Johnson, renewed his Motion for Suppression of Identification Testimony and For Acquittal, which was denied. Transcript pages 308 - 315.
4. At the conclusion of the Government's case, counsel for Defendant, Eldridge, moved for Acquittal which was denied. Transcript pages 313 - 314.
5. Trial Court's Instruction concerning reasonable doubt not advising jury to consider lack of evidence. TR 463-464.

STATEMENT OF THE CASE

An indictment was returned May 6, 1960, charging appellant, Edward Johnson and Austin C. Eldridge, with assault with intent to commit robbery while armed, assault with intent to kill while armed, assault with a dangerous weapon and possession of a prohibited weapon. Count one charged that on April 3, 1960, within the District of Columbia, appellants while armed with a dangerous weapon, that is a pistol and a shot gun, feloniously and wilfully assaulted Floyd L. White by force and violence and against resistance and putting in fear, with intent to steal and take valuable goods and property from the person and from the immediate actual possession of the said Floyd L. White. Count three charged that on the same date and place, appellants while armed with a dangerous weapon, that is a pistol and shot gun, assaulted Floyd L. White with intent to kill him. Count five charged appellants on the same date and place with having assaulted Floyd L. White with a dangerous weapon, that is a pistol and a shot gun.

Count eight charged appellant, Edward Johnson, with possession of a prohibited weapon, eg. sawed-off shotgun on April 3, 1960. Count nine charged appellant Austin C. Eldridge with possession of a prohibited weapon on April 3, 1960.

The indictment of May 6, 1968, also included Counts two, four and six against appellants, which on Motion were dismissed by the trial court.

Appellants' Motions for preparation and production of Grand Jury testimony were granted.

Appellants' Motions to suppress identification testimony were denied. Thereafter, on January 8, 1969, the case went to trial before Judge Gesell and a jury. On January 13, 1969, the jury returned a verdict of guilty on Counts one, three, five and eight, against Appellant, Edward Johnson, and a verdict of guilty as an accessory after the fact on Counts one, three and five, and guilty of Count nine against Appellant, Austin C. Eldridge.

A third co-defendant, Clarence Hawkins, was found guilty on Counts one, three and five in addition to being found guilty on Count seven wherein he was charged with carrying a dangerous weapon, e.g. a pistol.

On March 7, 1969, Judge Gesell sentenced Appellant, Austin C. Eldridge, five to twenty years on Count one; five to twenty years on Count three; one to five years on Count five and forty months to ten years on Count nine, said sentences to run concurrently.

On March 14, 1969, Judge Gesell sentenced Appellant, Edward

Johnson, three to ten years on Count one; three years to ten years on Count three; three years to ten years on Count five and one year on Count eight, said sentences to run concurrently.

Judge Gesell ordered a mental examination for co-defendant, Clarence Hawkins, to determine his present mental condition, his mental condition at the time of the offense and whether or not the offense is a product of his mental condition at that time.

Subsequent to the rendering of the verdict and prior to sentencing, Appellants herein filed motions for judgment of acquittal or in the alternative, for a new trial, which were denied by Judge Gesell.

On April 11, 1969, Appellant, Austin C. Eldridge filed a pro se motion to dismiss the indictment and motion to suppress unconstitutional arrest implementation to defendants' 4th Amendment right which was denied by Judge Gesell on April 25, 1969. Appellant Eldridge on April 17, 1969, filed a pro se motion for arrest of judgment. The motion of Appellant Eldridge for judgment of acquittal or new trial filed January 23, 1969, was denied by Judge Gesell on June 18, 1969.

The Motion of Appellant Edward Johnson for judgment of acquittal or new trial filed January 17, 1969, was denied by Judge Gesell on June 18, 1969.

Floyd L. White testified that he was the proprietor of the Ethical Pharmacy, Inc. located at 510 Florida Avenue, N. W., District of Columbia and was present therein with his employee, Mrs. Virgie Jackson, about 4 p.m. on April 3, 1968. (TR 59-60) Government Exhibits one through nine, upon being identified by Mr. White as pictures showing the condition of the pharmacy on April 3, 1968, were received in evidence over the objection of the attorney for Appellant, Edward Johnson, that they were incomplete and did not give a proper view of the store. (TR 60)

Dr. White further testified that shortly after four p.m. on April 3, 1968, while he and Mrs. Jackson were alone in his store, two men entered...one with a pistol in his hand (TR 70), the other with an object in his hand which the witness could not identify. (TR 71) The man with the pistol (subsequently identified as Clarence Hawkins) said Halt or Hold it. Dr. White then stepped behind a unit in the rear of his store at which time the man with the pistol fired a shot as he proceeded toward the rear of the store past the wrapping counter. Dr. White saw the second man in a half-kneeling position approximately parallel to the desk located in the front of the store. (TR 73) The witness then reached for his own pistol and fired. The man with the pistol took a position behind the cash register

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and he as to fire at the witness who, in turn, fired at the man with the pistol (TR 74-75) The witness while doing so, moved to his left behind the unit because he thought the second man was in the store but he had left. (TR 75) The witness immediately qualified this by saying: "I saw what I thought to be him leaving the store." (TR 75) Mrs. Jackson left the store when the first shot was fired. (TR 76) After exchanging a number of shots, the man with the pistol threw an object at Dr. White and then exited the store via a plate glass window. Dr. White followed him into the street and shot in his direction as he ran south on Florida Avenue. The man with the pistol ducked into an alley about a half block from the store. (TR 78) Dr. White further testified as to his recollection of the appearance of the man with the pistol and described the clothing worn by him. In doing so Dr. White said, as the man approached him he was able to continually see his face. (TR 87) Dr. White went with the police to Number Five Precinct where he recognized the man with the pistol sitting in a police car parked near the Precinct. He then identified, in Court, the man with the pistol as being Clarence Hawkins.

With respect to the second man who came into his store (subsequently identified in open Court by Dr. White as appellant,

Edward Johnson), Dr. White testified he saw him enter, that he was wearing a cap and dark-colored jacket, possibly green, and a dark shirt, a negro of dark complexion. That he did not recall seeing hair on the man's face. That as he, Dr. White went behind the unit, he could see him standing in the front through the mirror---the upper part of his body, including his face, full front view. That the man had been in the store earlier that day and asked Mrs. Jackson if he needed a prescription to get medicine. Upon receiving an answer, he left and immediately returned to ask if the store could fill a doctor's prescription and left again. (TR 84,95,96)

With respect to the man who entered the store with Clarence Hawkins carrying an unidentified object, Dr. White said he had two good views, as he entered and as he was standing in front as seen through the mirror. Based upon these observations, Dr. White identified the man as Edward Johnson, the appellant herein. (TR 97) Dr. White said the mirror referred to could be seen in Government Exhibits 6, 9 and 12. (TR 99)

Dr. White, on cross examination, testified when he recognized that the man (Clarence Hawkins) had a revolver in his hand, he went behind the unit and it was at that time the first shot was

fired. That the unit referred to is shown in Government Exhibits numbered 2 and 4. While Exhibit number 2 shows the unit, it would be hard to determine if you are not familiar with the store. In Exhibit No. 2, the unit is behind the front counter. (The witness evidently pointed to the front counter which from subsequent testimony must have been the one on which a glass divider was placed bearing the words....In keeping with the fine art of Apothecary). That Government Exhibit No. 4 was a picture of part of the unit taken from behind it. That the unit is about six feet high and that Dr. White was five feet seven inches tall. That he could not see over the unit. (TR 101-103)

Upon cross examination by Mr. Eberly, Dr. White testified that the unit was eight or nine feet wide. (TR 118) That when the men entered the store, Dr. White moved to his right behind the unit to see who had entered. (TR 119) Dr. White when shown a document marked Defendant Johnson's Exhibit One for identification, described as a copy of a statement he had given police on April 4, 1968, read therefrom as follows: "Had you seen one of them earlier that day?" "Yes. Mrs. Jackson said the man with the shot gun had been in the store twice that afternoon." This was followed by the following questions and answers:

Q All right. Then did you get your information from Mrs.

Jackson that this man had been in the store two times before that day?

A No.

Q Well, you said, "Mrs. Jackson said the man..."

A That is a statement of fact.

Q "...with the shotgun had been in the store twice that afternoon."

A That is a true fact.

Q She is the one that saw the man then, is that correct?

A She is the one that waited on the man. This is her job, to wait on people.

Q You didn't see the man, with this answer, did you?

A Oh, yes, I was filling the lady's prescription." (TR 127 - 128)

Virgie C. Jackson testified that on April 3, 1968, she was employed by Dr. White and was present, seated at a desk toward the front of the store known as Ethical Pharmacy when two men entered about 4 p.m. Her attention was first attracted when one of the men said, "Hold it." This man was 3 or 4 steps to the right behind her facing Dr. White who was in the rear of the store. She noticed nothing about this man except that he had a hand gun. When she turned around, she saw a second man

down in front of her desk holding a shotgun in his hands, that the gun he held looked like Government's Exhibit No. 13. That all she could say was that looked like the gun because she was so frightened. That the man with the shotgun, stooping down... squatting like...looked like the fellow who was in the store in the morning...the man who had come in that morning and asked if we sold medicine without a prescription and when told no, left and about two minutes later returned to ask if we could fill a doctor's prescription and left when told yes. When asked if she associated the man who had been in the store that morning with the man with the shotgun, she said: "Well, he looked like it (sic), that's all I can say." She thought the man with the shotgun had a jacket on. She was unable to relate any other observations because she left the store after hearing the first shot. (TR 136 through 144)

After being asked whether she could identify any of the two men who had entered the store, she answered, "I don't know whether the fellow with blue on....he looks like the fellow. I couldn't swear whether it is him or not." She was then asked to point out the man she was referring to and pointed to Appellant, Edward Johnson, as the person looking like the man whom she believed had the shotgun. (TR 144-146) On cross

examination Mrs. Jackson said that after leaving the store, she stood outside for a minute. When asked if she could see or hear what was going on inside the store other than gun fire, she answered, "No, no. I just know they was shooting, that is all. Was nobody left in there but Dr. White and the man."

(TR 150)

On cross examination by Mr. Eberly, she testified with respect to what she saw when the two men first came into the store, as follows:

"A I noticed somebody walk past, yes.

Q You saw another man squatting?

A I didn't see him until I turned around. After I turned around, there was the man on the floor.

Q This man on the floor, was he clean shaven?

A I think so.

Q And the man that passed you, was he clean shaven?

A I don't know because I just turned around and got a glimpse. You know how you turn around quick like that and look. I couldn't say.

Q The man you testified came in in the morning - -

A Uh-huh.

Q - - -asked several questions?

A Uh-huh.

Q Left and immediately came back through the door?

A About a couple minutes.

Q He was clean shaven?

A Yes.

Q You think you saw him again that afternoon?

A That afternoon." (TR 154-155)

Edwin Sylvester Wilkins testified that he was in his car almost in front of the Ethical Pharmacy located at 518 Florida Avenue about four o'clock p.m. on April 3, 1966, waiting for traffic to clear so that he could turn right on New Jersey Avenue. While waiting, he heard seven or eight pistol shots and as he turned to see whether he was caught in a cross-fire, he saw a young man in his mid-twenties, about five ft. eight inches tall, jump through a plate glass window from Ethical Pharmacy, with a pistol in his hand. (TR 156-158) He described in more detail the appearance of the man who jumped through the window, noting that he was wearing a rust colored jacket. (TR 159) That after he parked his car, he returned to the store and talked to the police, who had been called there. He then was escorted to the vicinity of number five precinct. There in a parking lot he saw in a police car, the man who had jumped through the

the window. He identified defendant Clarence Hawkins in Court as the man he saw jump through the plate glass window. (TR 155 - 156) On cross examination by Mr. Terry, he testified that when he heard the gun fire, the shots came simultaneously all together that he did not notice any break in firing and that there were six or seven shots. (TR 168)

John J. Hawkins testified that he was a sergeant assigned to the Special Operations Division of the Metropolitan Police Department and that he had been on duty from 8 a.m. to 4 p.m. on April 3, 1968. That at approximately 4:05 p.m. that day, he was in his personal automobile at Sixth and Florida Avenue, N. W., on his way home, waiting for a green light, when he observed a subject in front of a store who had commenced to run and a second subject come out of the store in a white smock and began shooting at the first subject. (TR 178) That he was about 50 feet away from the subjects when he first noticed them. That the first subject was a light complected negro wearing an orange pullover shirt...Subsequently identified as Clarence Hawkins by Sergeant Hawkins. That the second subject in white smock was later identified to be Dr. White (TR 179)

Sergeant Hawkins, off duty but armed, wearing a civilian jacket plus police shirt and trousers, driving his own personal

car without emergency equipment, noted the man in the orange shirt running into an alley and emerging on Sixth Street and decided to pursue him by turning right into Sixth Street, N. E. (TR 183-185)

As Officer Hawkins approached the intersection of Sixth and S Streets, N. E., the man in the orange shirt (Defendant Hawkins) was seen crossing S Street at a diagonal where he entered a white 1962 Cadillac convertible bearing temporary Maryland registration tag No. 125-331 parked opposite 500 S Street. As Defendant Hawkins entered the car, Officer Hawkins observed an individual sitting behind the wheel of the automobile (TR 185). As Officer Hawkins pulled up behind the white Cadillac, it moved on. As it moved the man who had gotten in started to put his jacket on. In the meantime, a third subject in the car popped up from the back seat, looked out the rear window and laid down again. The car proceeded at a normal rate along S Street, until it reached the intersection where 4th and Florida intersect. As to the man who popped up in the back seat of the Cadillac, Officer Hawkins had just a glancing look; enough to know that the man was a male negro. (TR 186) Officer Hawkins followed the Cadillac east along S Street to Florida Avenue, right on Florida to Third Street, N. E., to Third and K Streets, N. E. Up to this

point, the white Cadillac had travelled at a safe speed, but changing lanes to get in free-flow traffic as quickly as possible, trying to take the path of least resistance. (TR 191) At this point Officer Hawkins saw several police vehicles expediting with their emergency light on. He stopped long enough to holler, "Hold up man" and point to the white Cadillac. The detective to whom officer Hawkins hollered, looked first at him and then at the Cadillac and at the same time the three occupants of the Cadillac looked back at Officer Hawkins and sped off. (TR 192)

Sergeant Hawkins when asked if at that moment, without benefit of any further observations, whether he could describe the occupants of the white Cadillac, replied, three negro males, one of light complexion having a mustache. Sergeant Hawkins followed the Cadillac south on 3rd Street at a higher rate of speed to Massachusetts Avenue then right to 2nd Street and left on 2nd to C Northeast. In this area a white-colored crane (tow truck) pulled abreast of and passed by Sergeant Hawkins' car, as it passed the white Cadillac pulled in front of the Cadillac causing that car to stop. (TR 193) As soon as the white Cadillac was stopped, Sergeant Hawkins stopped his car about five feet behind it, got out of his car with drawn service revolver and ordered the occupants of the Cadillac to get out with their

hands up. The driver of the White Cadillac just sat and turned around and stared or glared at Officer Hawkins. The front seat passenger occupant got out with his hands up and the rear seat occupant looked out the window, which was, according to Sergeant Hawkins, the first time he had gotten a plain look at him, and then started backing out of the car. (TR 184-195) Just then it appeared to Sergeant Hawkins that the crane had backed up a few feet at which time the subject with the mustache (Defendant Hawkins) hollered, get in, and the subject in the back seat jumped in again, and then he hollered, Go man, go, at which time the Cadillac sped off again. (TR 184-185). Sergeant Hawkins testified that the man in the back seat never completely got out of the car, that his observation of the rear seat occupant was through the rear window at all times, that it was a good observation, no obstruction, just a sort of normal discoloring of the mirror, the glass itself, that is in a convertible. Sergeant testified that from that moment, he could identify all three occupants if he were to see them again. (TR 187-188) When the Cadillac pulled away, Sergeant Hawkins followed south on 2nd Street to Pennsylvania Ave., left to 4th Street, S. E., right to C to 3rd and C Sts., S. E. At this point for some reason unknown to Sergeant Hawkins, the Cadillac stopped and the occupant of the front passenger seat

jumped out and ran into an alley. Sergeant Hawkins was not certain whether the other occupants of the Cadillac had gotten out also. Sergeant Hawkins pursued the man with the orange shirt through an alley firing his gun at the running man on one occasion when he felt that the fleeing man may have intended to shoot and finally finding the man with the orange shirt lying on the ground, being held there by Mr. Figliuzzi. In the 200 block of C St., S. E., Sergeant Hawkins arrested the man in the orange shirt and in open Court identified him as Clarence Hawkins, Co-Defendant with the appellants herein. (TR 199-201) After the arrest of defendant Hawkins, Sergeant Hawkins retraced his steps back through the alley where he had seen a woman crawling under a parked car and found a pistol at about the same spot where he had observed defendant throw an object away. (TR 202)

The Sergeant went to C Street to report to his senior officer and while reporting, he observed an officer crossing C Street with the subject that was in the back seat of the Cadillac. Sergeant Hawkins in open Court identified that man as appellant Edward Johnson. (TR 205) Sergeant Hawkins further testified that when he went to the Fifth Precinct, he saw the driver of the white Cadillac sitting in a chair in the detectives' room. In open Court he identified the driver as the appellant herein,

Austin C. Eldridge. (TR 206)

On cross examination by Mr. Eberly, Sergeant Hawkins testified that when the cars were stopped at 2nd & C Street, N. E., he observed the man identified as appellant Johnson through the rear window of the Cadillac. The following questions and answers relate to the visibility of the window:

"Q It is your testimony today you had good visibility through this rear window?

A I had fair to good visibility through this window, sir.

Q Well, what do you mean by fair to good?

A Sir, if the man needed a shave, I probably couldn't tell you that. However, I could see his facial features very correctly, so I could identify him at a later time.

Q The driver, did he have a beard or mustache?

MR. LIPPE: Who are you talking about?

MR. EBERLY: The driver.

MR. LIPPE: Thank you.

MR. EBERLY: That is what I said. The driver.

THE WITNESS: To the best of my recollection at this time now, sir, I couldn't tell you. The only mustache that I paid any attention to was on the Defendant Hawkins.

BY MR. EBERLY:

Q Did the Defendant Johnson -- did he have a mustache on this occasion?

A Sir, at this time, to the best of my recollection, I couldn't honestly say. His features are very distinct to me but as to come down to the detail of a mustache at this time, I cannot remember.

Q You tell me you can recognize him but you can't recall whether he had a beard or mustache on his face?

A That is correct." (TR 227-228)

Francis Fortunato Tegliazzi testified that he and his employer about 4 p.m. on April 3, 1960, were riding in a tow truck when he heard over their two-way radio that a certain white Cadillac was being pursued by police and that the chase was nearing the area in which they were located. The car described was observed and the driver of the tow truck blocked it but the Cadillac swung around. Although he tried to open his door to keep them from going around any further, the door was smashed. (TR 230-239) After smashing the door, the Cadillac kept going. He and his employer followed the Cadillac and cut it off at another point. When the Cadillac stopped, the occupants got out...he did not know how many but some got out. He and employer got out. When asked how many went through the alley,

he replied, "About two." He saw Sergeant Hawkins go into the alley right behind them. He did not himself go up the alley but went up the street to another entrance to the alley and saw the man who jumped out of the Cadillac wearing a light tan jacket and orange kind of sweater and grabbed him. He identified in open court the person he grabbed to be Clarence Hawkins. (TR 242-243)

On cross examination by Mr. Terry, the witness testified that when his employer pulled in front of the white car for the first time, it was stopped for a couple of seconds or so. That when Sergeant Hawkins jumped out of his car, and started running up towards the car, they pulled off. That was when he swung open his door to keep them from going anywhere. He testified that the people in the white Cadillac did not get out until he and his employer stopped them the second time. (TR 248-249)

Anthony A. Mitchell testified that he was a Private assigned to the Fifth Precinct to scout car 56. That on April 3, 1960, he was on duty. About 4:30 p.m. on that date he learned of a police pursuit of a white Cadillac, Maryland temporary tags 125-331. While at the intersection of New Jersey and Independence Avenue, he observed a Cadillac of such description proceeding westbound on the unit block of Independence Avenue which was

2 or 3 blocks from 2nd & C Streets, S. E. Upon seeing the vehicle, he pulled his car across in front of the vehicle and it stopped. He drew his service revolver and ordered the driver, the sole occupant, to get out with his hands up, which he did. He then identified in open Court as the driver of the Cadillac, Austin C. Eldridge, the appellant herein. After placing appellant under arrest, he searched the car and found a sawed-off shot gun sitting right behind the driver's side in the rear, propped up against the front of the back seat of the car. He identified Government's Exhibit No. 13 as the gun he found. (TR 262-265)

Kenneth Maurice Flynn testified that on April 3, 1968, he was an investigator assigned to the Narcotics Section, Metropolitan Police Department. Shortly after 4 p.m., April 3, 1968, while he was in his office filling out papers, when he learned through a radio broadcast that a police chase of suspects was occurring in his area. He proceeded to his automobile which was equipped with police two-way radio and learning that the chase had ended at 2nd & C Sts., S. E., drove to that point. On arrival he saw a large crowd gathered. He proceeded to the middle of the 200 block of C and entered an alley going south. Half way down the alley he turned east on an east-west alley. Then he observed a subject trying to get out of that dead-end alley. The subject

was trying to climb up the side of the brick apartment building from window to window. He found the subject perspiring and breathing heavily, placed him under arrest and took him back to 2nd and C. Detective Flynn in open Court identified the subject he had arrested as appellant Edward Johnson. (TR 269-274)

On cross examination Detective Flynn, when shown defendant Johnson's Exhibit 12 for identification, said it was a photograph of the man he arrested in the alley on April 3, 1968. (TR 275)

Clarence Hawkins, a co-defendant with appellants, testified in his own behalf as follows: That he was a laborer; on April 3, 1968, about 4 p.m., he was in the Ethical Pharmacy for the purpose of getting drugs on a prescription. (TR 318-320) Upon entering he saw Dr. White and said, "Doctor, I got a prescription." Dr. White backed up behind a counter, pulled a gun and started shooting.

(TR 320) Also in the store at the time was a man named Blue.

(TR 321) After Dr. White began shooting, he picked up a stapling machine and threw it at Dr. White and then dove through the window. (TR 323) When he got through the window, Dr. White came out on the street and shot at him again. He ran to an alley, entered it and returned to and entered a car about one block away. (TR 324)

Q Did you know this car was there?

A Yes, because like, when we was coming down the street, you know, I saw this dude on the corner, so I told Cherry --

Q Don't tell us what was told to anybody.

THE COURT: You say you saw the car before you went into the pharmacy, is that what you are saying?

THE WITNESS: Yes, sir, I was in the car before I went into the pharmacy.

THE COURT: You came to the pharmacy in the car, is that what you say? You came to the area in the car?

THE WITNESS: Yes, to the area. It was on S Street.

THE COURT: All right.

BY MR. TERRY:

Q So you got into the car. The car was parked where, on S Street, did you say?

A. Yes

Q About how far from the pharmacy was that?

A It is about a block, maybe a block and a quarter.

Q And what happened after you got in the car?

A Well, like I said, I thought I was shot, you know, so I told Cherry to drive.

Q You told who?

A Cherry, Eldridge.

Q Mr. Eldridge, seated here at the table?

A Yes. When I got in the car, Blue was in there, too, you know.

Q Now, this is this fellow Blue that was also in the store?

A Yes. See, he and Blue went in there together.

Q Is Blue in the courtroom today?

A No.

Q Have you seen him since this incident on the third of April?

A No." (TR 324-326)

He testified further that in April 1968, he lived in Baltimore but had lived in Washington for a short period of time, that Austin Eldridge lived in Baltimore in April of 1968. That he and Eldridge came over from Baltimore on April 3, 1968, in Eldridge's car, the car involved, so that he could collect money due him from a man later identified as Simpson. He and Eldridge intended to return that evening to Baltimore. He did not know what happened to Blue. He said Blue jumped out of the car, he thought Blue got out of the car at the same time he did, when he was caught at 2nd and C Sts., S. E. That he did not see in what direction Blue departed. (TR 329-330)

On cross examination co-defendant testified: That the man who owed him money in Washington was named Simpson, who lived on 14th Street. He looked for him in several bars but never found him. That it was when he and Eldridge were coming down C Street that he met Blue, standing on the corner of 6th & S Streets. He got out, told Eldridge to wait that he would be right back.

(TR 334-335) Blue gave him a prescription for drugs and he went into Dr. White's store to get it filled. (TR 336-337) When he got into the car, he thought he was shot. He told Eldridge to drive, thought he was shot and began to pull off his coat. (TR 343)

That at a point where the tow truck blocked their car, he saw a man with a gun, whom he didn't know who did not have a police uniform on. (TR 344) He replied to Mr. Lippe's question as to whether he forced Mr. Eldridge to do anything by stating: "No, I didn't force him but he didn't know...actually didn't nothing no ways wrong." He testified that he did not see Government's Exhibit No. 13 (the shot gun) in the car on their way over from Baltimore. When asked if Blue was carrying the sawed-off shotgun when he met Blue on the corner, his answer was: "I don't know. I would assume so." This was followed by the following questions and answers:

"Q Do you think Mr. Blue was carrying a sawed-off shotgun?

A He could have had it.

Q Did you see it?

A No, I didn't see it on him, no, but he could have had it.

Q When you spoke to him, you saw his hands, did you not?

A Yes, like the man had on a long coat. I don't know what he had on.

THE COURT: You say he had on a long coat?

THE WITNESS: A leather coat.

THE COURT: A long leather coat?

THE WITNESS: Yes.

THE COURT: Was he holding anything under his coat?

THE WITNESS: What you mean, holding?

THE COURT: Yes. You don't stick a sawed-off shotgun up under your coat without it falling out unless perhaps you hold it.

THE WITNESS: He could have had it in his belt, your Honor.

THE COURT: Could have had it in his belt?

THE WITNESS: He could have had a strap in his coat. I don't know.

THE COURT: I see.

BY MR. LIPPE:

Q You didn't see him holding it, is that correct?

A No, I didn't see him holding it."

Mr. Bartle, trial counsel for Appellant Eldridge, questioned co-defendant Hawkins and elicited the following: That he, Hawkins, told Eldridge where to drive upon arrival in Washington from Baltimore and told him to wait after meeting Blue, that there had been no discussion with Eldridge about getting a fix. (TR 352-354).

Austin C. Eldridge testified in his own defense as follows: That he lived in Baltimore, Maryland, about 10 a.m. on April 3, 1968, he was in Miller's Tavern in Baltimore when Clarence Hawkins entered. After a few drinks, Hawkins asked to be driven to Washington, they agreed and they left for Washington about 10:30 or 11 a.m., arriving in Washington, they went to several bars looking for someone by the name of Sam Simmons or something like that. Later they came on some street and Hawkins said, "Wait a minute, I want to see Blue." Hawkins talked to three or four dudes on the corner, came to the car a few minutes later, said, "Wait a few minutes, I'll be right back," and left. He waited in the car about five minutes and a fellow jumped into the car saying: "Man, I'm shot, take me to the hospital. Say, Hawkins shot, too." And by that time Hawkins jumped in the car saying, "I'm shot, I'm shot, take me to the hospital." Everyone was screaming and hollering. He tried to find where the hospital

was but one of the men said keep going, keep oing, so he kept driving. (TR 359-360)

He also testified that he was to receive \$15.00 from Hawkins for the trip from and to Baltimore, that it was his first trip to Washington. (TR 361) He testified on cross examination by Mr. Eberly that he only used the rear vision mirror located inside the car when the top was down because one could not clearly see out of the rear window. (TR 367-368)

During cross examination by Mr. Lippe, Appellant Eldridge denied having seen Government's Exhibit No. 13 (the shotgun) prior to his arrest. The Court asked Eldridge: "Is it your testimony that during the entire time that you were driving after they got into the car, it was your impression you were headed to a hospital?" To which he replied, "Yes, sir."

STATEMENT OF POINTS

1. The Evidence Is Insufficient To Sustain The Jury's Verdict of Guilty As To Both Appellants.
2. The Trial Court's Instruction To The Jury with Respect to Reasonable Doubt Failed to Advise The Jury That Consideration Be Given to Lack of Evidence.
3. Appellant Edward Johnson was Denied Due Process of Law By Permitting Floyd White to Make a Tainted In Court Identification.

SUMMARY OF ARGUMENT

Assuming as a fact that two men did on April 3, 1968, about 4 p.m. enter the premises of the Ethical Pharmacy, does it follow from the competent evidence produced at the trial that Appellant Edward Johnson was beyond a reasonable doubt one of the two men? The only evidence connecting Johnson with the occurrence was provided by four witnesses, Dr. White, Mrs. Jackson, Sergeant Hawkins and Detective Flynn.

The in-Court identification of Johnson by Dr. White should have been suppressed and/or disbelieved for the following reasons. It is highly unlikely under the circumstances as described by Dr. White that he had a full minute to observe the man who entered his store with an object in his hand.

First of all, how long was the man with an object in his hand (or shotgun) in the store? Edwin Wilkins, who was waiting in his car outside the store, testified as to the gun fire he heard...the shots came simultaneously all together that he did not notice any break in firing and that there were six or seven shots (TR 168). Mrs. Jackson, who left the store after the first shot was fired, when asked what she could see or hear inside the store after she got outside, replied, "No, no. I just know they was shooting, that is all. Was nobody left in there but Dr. White and the man." (TR 150) Apparently she knew that the man with the shotgun had left. Dr. White testified that after he fired the first shot at the man with the pistol, he moved to his left behind the unit because he thought the second man was in the store but he had left. (TR 75) He immediately qualified this by saying, "I saw what I thought to be him leaving the store." (TR 75)

It would hardly seem likely that the man with an object in his hand was in the store for a whole minute, much less that he was under observation by Dr. White for a minute.

Dr. White was interrogated by Judge Gesell, prior to the opening statement to the jury for the purpose of determining whether his seeing the appellant Johnson in the precinct would

taint his on-scene identification. (TR 31) Judge Gesell examined the transcript of testimony adduced before Judge Green on the question as to whether there had been a Wade violation within the precinct. (TR 36) It appears from such transcript on pages 111 and 112 that the defendants, including appellant Johnson, were not advised of their right to have counsel present at a line-up or confrontation and that the Appellant, Johnson, had been identified in the precinct by Dr. White. Dr. White in answer to Judge Gesell's questions stated that he had two good looks at Johnson when he first entered the store and just before he left the store, from two different angles, about 20 feet away, full face. (TR 36) Dr. White's testimony as to viewing Johnson for one half minute upon his entry becomes suspect when he is unable to determine that the object in his hand was a sawed-off shotgun. (TR 71) His failure to do so is understandable in view of the fact that the other man said, "Hold it," as he exhibited a pistol and then shot at the witness. (TR 70) The fact that Dr. White at the time he first observed the men entering his store was standing just a step away from the rear unit behind which he retreated before the first shot was fired, (TR 71) negates his statement that he observed Johnson for thirty seconds. He could have walked a distance of 70 feet at a slow pace in

that time.

The second full face look at Johnson for thirty seconds must have been through or by way of the mirror on the side wall. Government's Exhibit No. 2 apparently taken from a position in front of the receptionist's desk, shows only the top of the medicine cabinet and objects on top thereof. Comparison with other pictures (Government Exhibits 6, 8, and 12) showing the mirror on the medicine cabinet disclose the same objects. It follows that Dr. White, standing behind the six foot high unit, could not have seen a man through the mirror, standing or kneeling at a spot parallel to the desk. The exhibit No. 2 shows papers or other objects appended to the glass divider on the work table in back of the receptionist's desk. This would make it more difficult for a short man to identify a person standing on the other side either by direct vision or via a mirror. Then too, Dr. White said in response to Mr. Lippe's question, "As the man approached you, sir, were you able to continually see his face? A. As he approached me? Q. Yes. A. Yes, I saw his face in the mirror." (TR 87) If he was continually looking at Hawkins through the mirror, how could he have seen the man he identified as Johnson on the opposite side of the room.

Judge Gesell seemed to be much impressed with Dr. White's

testimony that he had seen the man he identified as Johnson on two occasions earlier that day. (TR 45) Is Dr. White had in fact seen the man who had been in the store earlier to inquire about getting medicine without and with a doctor's prescription, why was it impossible for him to recall whether such man had hair on his face? (TR 95) Why would he say that the man he identified as Johnson was wearing a dark colored jacket, possibly green and a dark shirt? (TR 94) Defendant Johnson's Exhibit No. 13 A, receipt from the Department of Corrections, D. C., describes the jacket taken from Johnson as brown leather. Detective Flynn who arrested Johnson on April 3, 1968, described him as "very dark complected....his hair was not close, and he also had a mustache, and he had on, I think it was black with yellow stripes in the shirt, then (sic) ran across his body." (TR 274) Detective Flynn when shown Defendant Johnson's Exhibit 12, stated that it was a photograph of the man he arrested on April 3, (TR 275)

Dr. White when shown Defendant Johnson's Exhibit No. 1 for identification, testified that it was a true fact that "Mrs. Jackson said the man with the shotgun had been in the store twice that afternoon." (TR 126-127) While Mrs. Jackson may have told this to Dr. White and by so doing lead him to believe

that she had recognized the man with the shotgun, it is contrary to her testimony at the trial. She testified that the man with the shotgun looked like the fellow who was in the store in the morning. (TR 142) When asked if she could identify any of the two men who entered the store, she answered, "I don't know whether the fellow with blue on...he looks like the fellow. I couldn't swear whether it is him or not." She then pointed out Johnson as looking like the man. (TR 145) On cross examination, Mrs. Jackson said she thought the man squatting on the floor in front of her desk was clean shaven. When asked if the man who had entered the store in the morning to inquire about filling prescriptions was clean shaven, she replied, "Yes." (TR 155) At the time the man, whoever he was, came into the store, morning or afternoon, Mrs. Jackson talked with him and observed him under what could be assumed to be normal conditions. That is, without guns being brandished, etc. Under these circumstances, her recollection that such man was clean shaven should clearly eliminate Johnson as being the person in the store with the shotgun. If the man with the shotgun looked like the fellow who had been in the store earlier, such person could have been Blue. Defendant Hawkins' testimony was that Blue knew about Dr. White's pharmacy. (TR 337) Mrs. Jackson's statement to Dr. White

that the man with the shotgun was the same man who had been in the store earlier, could well have lead him to believe that the man he had at best a fleeting glimpse of with an object in his hand that afternoon was the same man who had earlier inquired about prescriptions.

Sergeant Hawkins, who identified Johnson as being a passenger in the white Cadillac from the time it left the vicinity of 509 S Street, N. W. until it got to a point about 3rd and C Sts., S. E., testified as follows: That when the Cadillac was stopped by the crane at 2nd & C Sts., N. E., he got out of his car, parked five feet behind, drew his service revolver and ordered the occupants out with their hands up. The rear seat occupant looked out the window "and the first time I really got a plain look at him and then started backing out of the car." (TR 195)

When asked did he turn towards you so you could observe his features when he actually got out of the car, Sergeant Hawkins answered, "Sir, he never got completely out of the car. My observation of him was through this rear window at all times." When asked was there much obstruction between you and his face, Sergeant Hawkins replied, "No, sir, just a sort of normal discoloring of the mirror, the glass itself, that is in a convertible." Defendant Johnson's Exhibit No. 5, a picture of the

Cadillac in question, reveals that objects in the car seen through the rear window are blurred as compared to the sharpness of objects seen through the glass window of the same car as reflected by Defendant Johnson's Exhibit No. 10. On cross examination, Sergeant Hawkins said he had fair to good visibility through the rear window....he probably would not be able to tell if a man needed a shave but he could see facial features very correctly. (TR 227) He was unable to remember whether Johnson had a beard or mustache. (TR 228) This statement is in direct conflict with his earlier testimony reading as follows: "At that time, it appeared to me that the crane had backed up a couple of feet, at which time the one subject sporting the mustache, hollered, Get in V and the third subject in the back seat jumped back in again, and then he hollered, Go, man, go, at which time the Cadillac sped off again." (TR 195) (emphasis supplied) Sergeant Hawkins did not see the man in the back seat again, the man he identified as Johnson, for when at 3rd and C Sts., S. E., he saw one subject bail out and followed him through an alley. He may have seen two bail out but he followed the man with the orange shirt, the one sitting in the front passenger seat. (TR 198-199) Notwithstanding the fact that the Sergeant Hawkins only saw the occupant of the rear seat through what at best was a translucent

rear window, which obstructed his view so much that he could not see a prominent mustache, he was able to say the man in the back seat was one and the same as the man arrested by Detective Flynn, the appellant herein, Edward Johnson.

It must necessarily follow that had the in-Court identification of Johnson by Mr. White been suppressed, the jury could well have found that the testimony of Mrs. Jackson and Sergeant Hawkins on the question of identification was insufficient to convict him.

Without the identification testimony of the three witnesses would the jury be likely to give any weight to Detective Flynn's recital of facts as to the arrest of Johnson?

A verdict of acquittal should have been returned as to appellant Johnson on all counts.

As to appellant, Austin C. Eldridge, there is no question as to identification. It was admitted that on April 3, 1968, he was driving the white Cadillac, owned by his mother, bearing temporary Maryland tags 125-331. (TR 303) He lived and worked in Baltimore, Maryland, as did defendant Hawkins. On the day in question, he, at Hawkins request, drove the latter to Washington, D. C. On arrival about noon, he and Hawkins visited several bars looking for a man who owed Hawkins money. Later

that afternoon, as they were driving along, Hawkins saw a man called Blue standing on a corner and asked Eldridge to stop so he could talk to him. Eldridge parked the car and waited approximately five minutes when a man jumped into his car yelling he was shot and Hawkins was shot also. Hawkins then came and jumped into the car saying, I'm shot take me to the hospital. (TR 360) Eldridge then drove as has been related heretofore. Eldridge was unfamiliar with Washington, it being his first trip to the city. (TR 361) His testimony on direct and cross examination was to the effect that Hawkins directed or told him which street to drive on. According to Sergeant Hawkins, who was following in his own personal car, Eldridge kept at a normal rate of speed along S Street until it reached the intersection where 4th and Florida Avenue intersect. (TR 189) From the Coliseum area, the Eldridge car proceeded at a higher rate of speed. (TR 193) At 2nd & C Sts., N. E., a tow truck passed Sergeant Hawkins and the Eldridge car and then angled in front of the latter car causing it to stop. (TR 193) The fact that the tow truck passed both cars would seem to indicate that they were not going at an excessive speed. When the Eldridge car stopped, Sergeant Hawkins drew his service revolver and ordered the occupants out. (TR 194) The officer, wearing a civilian jacket, did not

testify that he announced at that time that he was a policeman. When the tow truck backed up, according to Sergeant Hawkins, the defendant Hawkins, who had gotten out of the car, jumped back in and ordered Eldridge to drive on, which he did. (TR 184-185) Mr. Figliuzzi, who was riding in the tow truck that stopped the Eldridge car, testified as to that occurrence:

".....and we did get him to a point where we blocked them, and they swung around, and to my knowledge...what I tried to do, I tried to open the door, to keep them from going around any further, and they smashed the door to the truck."

From this witness it appears that Eldridge seeing the tow truck pulling over in front of him, stopped not because he couldn't proceed but to avoid a possible collision. When it became apparent to defendant Hawkins that there was sufficient room to proceed, he yelled, "Get in, drive." At that time Mr. Figliuzzi opened his door to keep the Eldridge car from going around. Under these circumstances, can it be found beyond reasonable doubt that Eldridge was aware that Sergeant Hawkins was a policeman seeking to arrest the men in his car? While defendant Hawkins testified that he did not force Eldridge to do anything (TR 350), the fact remains, he stated on numerous occasions that he ordered Eldridge to drive. Eldridge says he

was told by Hawkins "drive" and Sergeant Hawkins heard defendant Hawkins order Eldridge to "drive." When Eldridge was stopped by Officer Anthony Mitchell about 3 blocks from the 200 block of C Street, S. E., he offered no resistance getting out with his hands up as ordered. (TR 263) That is when the sawed-off shotgun was discovered sitting on the floor in back of the driver's seat, leaning up against the rear seat in Eldridge's car. Did Eldridge know it was there? He testified that he did not. (TR 380) This is probably true, otherwise he would have thrown it away. According to Officer Mitchell, the police had lost contact with the White Cadillac after it had left 2nd & C St., S. E. (TR 262)

If Blue was the man with the sawed-off shotgun, he managed, apparently, to walk out of the Ethical Pharmacy without anyone seeing him with it and jump into Eldridge's car and fall on the floor on the back seat without Eldridge seeing it. The jury by finding Eldridge guilty only as an accessory after the fact, in effect, found that he had no prior knowledge of any attempted hold up. This would seem to be in contradiction to the finding that he knowingly had in his possession a prohibited weapon. Why would Eldridge, not a dope addict, drive from Baltimore to Washington, to hold up a drug store using a car registered in

his mother's name and knowingly permit a sawed-off shotgun to be placed therein?

A verdict of not guilty should have been returned as to all counts against appellant Austin C. Eldridge.

ARGUMENT

The Evidence Is Insufficient To Sustain The Jury's Verdict of Guilty As To This Appellant.

Whether or not there is sufficient evidence to sustain a verdict of guilty must be determined on the basis of the evidence as it stood at the conclusion of the Government's case.

Cephus v. United States, 117 U.S. App. D.C. 15,
324 F. 2d 893 (1963)

Borum v. United States, 380 F. 2d 585, 596 (1967)

Austin v. United States, 383 F. 2d 129, 138 (1967)

In Cephus this Court said (324 F. 2d at 895):

Accordingly, Rule 29(a) of the Federal Rules of Criminal Procedure provides that a motion for judgment of acquittal must be granted "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." Denial of such a motion at the close of the Government's evidence is not immediately reviewable. Nevertheless, if defendant then rests or if he introduces evidence which adds nothing to the Government's evidence, the sufficiency of the Government's case-in-chief may be reviewed on the appeal from a conviction. (Emphasis added)

In Austin, supra, this Court said (382 F. 2d at 138):

A motion for acquittal must be granted when the evidence, viewed in the light most favorable to

the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime. We consider this issue on the basis of the evidence as it stood at the conclusion of the Government's case. (Emphasis added)

What did the evidence show at the close of the Government's case? That two men had entered the Ethical Pharmacy about 4 p.m. on April 3, 1966, one with a pistol and the other with a sawed-off shotgun. The one with the pistol said, Hold it, and shot at the proprietor, who retreated behind a high partition in the rear of the store, picked up a gun and returned the fire. An employee, Mrs. Jackson, left the store as did the man with the shotgun. The man with the pistol after firing a number of shots, threw an object at the proprietor and then jumped through the window of the store. He was seen doing so by a witness sitting in a car who later identified him in Court. A police officer, Sergeant Hawkins, observed a man with an orange shirt in front of the Ethical Pharmacy, look/both directions, and then run into an alley after he had been shot at by a man who came out of the store wearing a white smock. Sergeant Hawkins, sensing a holdup had been attempted, saw the man in the orange shirt emerge from a vacant lot a short distance away and gave chase in his own personal car. He saw the man enter a white Cadillac

a block away from the Ethical Pharmacy. The car proceeded at a normal rate of speed for several blocks. As the officer followed the white Cadillac, he discovered that in addition to the driver and the man in the orange shirt, there was a third passenger who popped up in the back seat and looked out the rear window--getting only a fleeting glance, the officer could not describe him, other than as a male negro. At 2nd & C Sts., N. W., the white Cadillac was stopped by a tow truck pulling in front of it on an angle. The officer pulled up behind the car and saw the driver of the white Cadillac full face through the side window thereof, who was identified by the officer as the Appellant, Austin C. Eldridge. Eldridge admits that he was driving the white Cadillac which was registered in his Mother's name, a resident of Baltimore. For the first time the officer, Sergeant Hawkins, got his first good plain look at the occupant of the rear seat of the white Cadillac through the rear window of the car which had normal discoloring for a convertible rear window which was six years old. The officer, after this first good plain look, was unable to recall whether such occupant had a mustache or beard...although at another point in his testimony, he said, "The one subject sporting the mustache, hollered get in, and the third subject,

in the back seat, jumped back in again." The car sped off and the officer thereafter did not see the occupant of the back seat in the car or notice where he went when and if he got out a short time later. The occupant of the front seat passenger side, the man with the orange shirt, the one subject sporting a mustache, was apprehended and later identified as Clarence Hawkins by the officer, Sergeant Hawkins, who saw him in front of the Ethical Pharmacy, by the witness who saw him jump through the window of the Ethical Pharmacy, and by the proprietor of the Ethical Pharmacy, the man he was shooting at.

A few minutes after Clarence Hawkins was arrested at the 200 block of C St., S. E., Edward Johnson, Appellant, was arrested by Detective Flynn in an alley nearby. Detective Flynn found Johnson in a dead end alley sweating, breathing heavily, trying to climb up a brick apartment house, window by window. When Detective Flynn brought Johnson to an area near the 200 block of C St., S. E., Sergeant Hawkins, the officer who had been following the white Cadillac, identified him as the occupant in the rear seat of that car. This he did not withstanding the fact that Johnson had a mustache. Officer Mitchell, in response to a police radio broadcast, stopped the white Cadillac about 3 blocks distant and arrested Eldridge. Upon

search of the car, a sawed-off shotgun was found in the floor, back of the driver's seat, tilted up against the rear seat.

Mrs. Jackson's testimony that she thought the man holding the shotgun in the store was clean shaven; that he looked like a man who had been in the store earlier, who was clean shaven; her reluctance to swear in Court that Johnson was the man with the shotgun...only that he looked like the man with the shotgun, should have been sufficient to induce in the minds of the jurors a reasonable doubt as to his guilt when it was undisputed that he had a mustache.

As to Eldridge, the jury by finding him guilty of being an accessory after the fact, in effect, determined that he was without knowledge of any attempt by his passenger, Hawkins, to commit a crime.

What evidence was offered to show that Eldridge knew anything more than two men were in his car as he left S Street, N. W., and drove normally until he met up with a tow truck and a man with a gun at 2nd and C Streets, N. E.? The jury did not believe that he was in on a plan to hold up a drug store. Normally in a planned holdup the get-away car is a previously stolen vehicle not a white and black convertible Cadillac registered in the name of the get-away driver's Mother. If Eldridge did not know of

plans to hold up the drug store, why then was it a crime to do what he was told to do by Hawkins...who claimed he was shot... take him to a hospital, as directed?

The jury found Eldridge guilty of possessing a prohibited weapon, a sawed-off shotgun. The weapon was found in the back seat behind the driver's seat, standing on the floor, tilted back against the front of the back seat of Eldridge's car in which he was the sole occupant. The occupant of the rear seat had departed from there prior to the time Eldridge was stopped and arrested. According to Mrs. Jackson, someone looking like a clean shaven man, who had been in the store earlier, had come in with the man with a hand gun who shot at Dr. White. And that someone had a shotgun. If that ~~someone~~ was clean shaven, he was not Johnson but he could have been Blue. If he was Blue and Hawkins said he was, then it was Blue who went to where he may have seen Hawkins' friend, Eldridge, park the car and jump in taking his shotgun with him. The jury in finding Johnson guilty on all four counts including the possession of a prohibited weapon, was no doubt greatly influenced by Dr. White's in-Court identification of Johnson as the man who came in with Hawkins. Having decided that Johnson was in the store, it was easy to accept the identification of Johnson by

Sergeant Hawkins and accept the theory of Detective Flynn that Johnson's actions in the blind alley indicated that he was in flight. The next logical step was for the jury to find Johnson guilty of possession of a prohibited weapon.

If Blue or Johnson put the shotgun in Eldridge's car without his knowledge, why should he be guilty of knowingly having possession of a prohibited weapon?

The jury should have been charged in determining whether a reasonable doubt existed to consider the lack of evidence as well as the evidence.

State v. Grattan 256 Iowa 273

State v. Anderson 209 Iowa 510

Bishop v. United States 107 Fed 2d 297

Laughlin v. United States 365 Fed 2d 287

In Anderson the trial Court instructed as follows:

"All matters left for your determination are to be determined by you alone from the evidence before you and after a full and careful consideration of the same, etc. "

The Iowa Supreme Court in reversing found:

"All matters left for determination necessarily included the question of reasonable doubt. Appellants' contention is that this instruction did not include, but excluded, a reasonable doubt which might arise from a lack or want of evidence. It is apparent that appellant is right in his contention, for the Court, in the instruction, in terse language, states that the question of reasonable doubt, as well as all other matters for their determination, are to be

determined by you alone from evidence before you. We have repeatedly refused to approve an instruction on reasonable doubt which excludes a reasonable doubt arising from the lack or want of evidence."

In Grattan, the Iowa Supreme Court found:

"By reference to the Anderson case, it will be noted that the majority opinion therein held it essential to an adequate instruction on the subject of reasonable doubt that the jury be advised as to the effect of 'a lack of evidence'."

In Bishop this Court, as it was a capital case, examined the charge to the jury notwithstanding trial counsel's acquiescence to the charge at the time it was given. This Court found the instructions were clear, complete and fair. In which the trial court charges included with respect to reasonable doubt:

"Reasonable doubt is a doubt arising from the evidence or from a lack of evidence, after consideration of all evidence."

In Laughlin this Court commenting on Appellant's claim that it was error not to add ~~that~~ **reasonable** doubt might arise from lack of evidence, stated:

"To be sure, we have on occasion defined reasonable doubt as 'a doubt arising from the evidence or from a lack of evidence, after consideration of all the evidence.' E.g. Bishop v. United States 107 Fed 2d 297. But we did not thereby make our language the only correct formula. In fact, in a case where some lack of evidence for the Government fairly creates a reasonable doubt of guilt, we may expect a normally intelligent jury to perceive that fact after comparison and consideration of all the evidence."

Absent proper identification, there was such a lack of

evidence connecting Johnson with the crimes charged that the jury should have had a reasonable doubt as to his guilt.

The jury returned a verdict of guilty against Eldridge on the prohibited weapons charge notwithstanding the lack of evidence that he had knowledge of the fact that it was in his car.

Appellant Edward Johnson was denied due process of law by permitting Floyd White to identify him in Court after a tainted precinct confrontation in violation of Wade.

The trial Court's discussion and examination of Floyd White concerning the latter's ability to make an in-Court identification independent of his having seen Johnson in custody in the precinct is found in the transcript pages 31 to 45.

United States v. Wade 388 U.S. 218
Gilbert v. California 388 U.S. 263
Stovall v. Denno 388 U.S. 293

This Court fully reviewed the last-above mentioned three cases in the opinions rendered December 6, 1968, in the cases of Clemons v. United States, U.S. App. D.C. 19846; Clark v. United States, U.S. App. D.C. 21001; and Hines v. United States, U.S. App., D.C. 21246.

Judge Gesell, after examining the transcript of the hearing before Judge Green, on the Motion to Suppress Identification

Testimony, felt that the issues under made were ^{not} brought into focus before Judge Green with sufficient clarity for him to accept her ruling. Judge Gesell further felt with respect to the identification of Johnson, he should hear the identification witness at some stage out of the presence of the jury for a few additional questions before determining whether or not that witness's view of Johnson at the precinct taints his on-scene identification. (TR 31)

Judge Gesell in ruling that Floyd White could testify to the identification said: "It is quite one thing to see a man you have never seen before and it is another thing to see a man you have seen before, that is the testimony here." (TR 45)

At that time the Court did not have the benefit of testimony adduced at the trial which cast grave doubts as to whether Dr. White had Johnson in view twice for periods of thirty seconds each in the store at the time of the shooting or that he had seen him earlier in the store. His incorrect description of the clothing worn by Johnson and his inability to recall whether Johnson was clean shaven, cast doubt that he had observed Johnson four times on April 3, 1968, before seeing him in the precinct.

Mrs. Jackson's statement to Floyd White, which he believed

to be true, that the man with the shotgun had been in the store prior to the shooting, had to influence his belief that he had seen Johnson earlier that day.

Mrs. Jackson testified at the trial that the man with the shotgun looked like the clean shaven man who had been in the store earlier.

If Floyd White's testimony as to identification of Johnson was suppressed, then the questionable identifications by Mrs. Jackson and Sergeant Hawkins may have carried little weight with the jury. If the jury believed that Johnson had not been sufficiently identified as the person who had been in the store or in the white Cadillac, then the testimony of Detective Flynn as to the circumstances surrounding the arrest of Johnson, loses much of its significance.

The motion to suppress testimony of Floyd White as to identification of Johnson should have been granted.

CONCLUSION

For the reasons stated, the convictions of appellants should be reversed with directions to enter a judgment of acquittal.

Respectfully submitted,

Thomas H. Carolan
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Attorney for Appellants 16.
Appointed by this Court

REPLY BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,922

UNITED STATES OF AMERICA,

Appellee,

v.

AUSTIN C. ELDRIDGE,

Appellant.

No. 23,071

UNITED STATES OF AMERICA,

Appellee,

v.

EDWARD JOHNSON,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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ARGUMENT

The appellee argues even if it was error to admit Mr. White's identification, the evidence against appellant Johnson was so overwhelming that the error must be considered harmless and in support thereof recites that Mrs. Jackson identified Johnson as the second man in the store and that her identification is re-enforced by the fact that she remembered him to be the same man who had entered the store and spoken to her earlier. (Ap. Br. 18)* The testimony of Mrs. Jackson on the whole exonerates appellant Johnson. When asked if she could identify the men who entered the store, she said, "I don't know whether the fellow with blue on.....he looks like the fellow. I couldn't swear whether it is him or not." When the trial judge asked her to point to one, because there were several in blue, she pointed to appellant Johnson as looking like the man who had been in the store holding the shotgun. (TR 145). She testified that the man who had been in the store earlier, who looked like the man with the shotgun, was clean shaven. (TR 155) The testimony of Sergeant Hawkins, who appellee argues had no doubt that Johnson was the man he had seen in the back of the Cadillac, likewise tends to exonerate appellant Johnson. Sergeant Hawkins, in relating what happened when the Cadillac was first stopped, on direct examination

*Ap.Br. - Appellant's Brief

testified:

"At that time, it appeared to me that the crane had backed up a couple of feet, at which time the one subject sporting the mustache, hollered, Get in, and the third subject in the back seat, jumped back in again....."

At that moment, it seems clear that Sergeant Hawkins had decided in his own mind that only defendant Hawkins of the three men in the car, was sporting a mustache.

Appellant Johnson is clearly the victim of mistaken identity. The jury could well have found him not guilty except for the tainted in-Court identification by Mr. White.

The man who accompanied defendant Hawkins to the store was seen therein only by Mr. White and Mrs. Jackson. From Mrs. Jackson's and Mr. White's description of that second man, it could not have been appellant Johnson, who was not clean shaven nor wearing a dark-colored jacket, possibly green, and a dark shirt when apprehended about thirty minutes later.

Appellee argues that the jury could have concluded that appellant Eldridge purposely parked in a location that was designed to assist the two principals in their escape. (Ap.Br. 21) This assumption is in contradiction to the finding by the jury of guilty as an accessory after the fact instead of guilty

as an aider and abettor.

In Bailey v. United States, slip opinion No. 21428, decided by this Court on March 7, 1969, it was held that appellant's presence at the time of the crime, coupled with his association with the perpetrator shortly prior to the robbery, does not warrant an inference of guilty of collaboration.

This Court in Bailey said, an inference of criminal participation cannot be drawn merely from presence; a culpable purpose is essential. In Hicks v. United States, the Supreme Court recognized that the accused's presence is a circumstance from which guilt may be deduced if that presence is meant to assist the commission of the offense or is pursuant to an understanding that he is on the scene for that purpose. And we have had an occasion to say that [M]ere presence would be enough if it is intended to and does aid the primary actors.

Presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed---as when the accused acts as a lookout---or where it stimulates others to render assistance to a criminal act. But presence without these or similar attributes is insufficient to identify the accused as a party to the criminality.

As in the case of Bailey, there is no evidence herein to dispute that appellant Eldridge did more than to associate with defendant Hawkins by driving the latter to Washington from Baltimore for the purpose of collecting money from one of Hawkins' debtors.

As to appellant Eldridge, there are two questions: Did he knowingly have possession of a sawed-off shotgun and did he, with knowledge that an offense had been committed, receive, relieve, comfort or assist the offenders with intent to hinder or prevent the latter's apprehension, trial or punishment.

As to the possession of a prohibited weapon (sawed-off shotgun) reference is made to (TR 313 and 314) wherein the Trial Court stated that the testimony of the officer identified Eldridge as the driver of the car, the getaway car, that the case against Eldridge, ".....is an aiding and abetting case. He not having been shown to have had any gun of any kind in his personal possession whatsoever." This was after the close of the Government's case, nevertheless the Court submitted to the jury the charge of Count Nine, charging Eldridge with possession of a prohibited weapon. This, coupled with the Court's failure to charge that in arriving at a verdict of guilt beyond a reasonable doubt, the jury should consider not only the evidence but

the lack thereof, was an error that undoubtedly influenced the jury in returning the verdict of guilt as an accessory after the fact.

It is true that appellants' trial counsel did not object to the trial Court's instructions to the jury but in Bishop v. United States, 107 Fed 2d 297, this Court, as it was a capital case, examined the charge to the jury, notwithstanding trial counsel's acquiescence to the charge at the time it was given. Does it make any difference because a possible sentence is 15 or 20 years, life or death, whether a charge is correct or incorrect or whether trial counsel acquiesces or objects?

Appellee argues that it is sufficient to simply show that Eldridge had knowledge that a crime had been in fact committed. (Ap.Br.20) Where is there a single shred of evidence to show that Eldridge was anything but a chauffeur for defendant Hawkins on April 3, 1968? Appellee argues that a guilty knowledge may be inferred from the circumstances. Not according to Bailey rules this Court. Moreover, it is difficult to believe that Eldridge, driving his mother's white Cadillac convertible, with temporary Maryland license tags, a distinctive set of wheels, would have knowingly and voluntarily subjected and associated himself to a planned robbery or attempted

escape or possessing a shotgun.

Appellants respectfully request this Court to reverse the convictions with direction to enter verdicts of acquittal.

Respectfully submitted,

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